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track; that the plaintiff was at the usual and proper place for inspecting cars, having no reason to expect that a yard engine would be running on the track at that time; and that his danger could have been seen, and the accident avoided, if the employes on the engine had been performing their duty; and could have found in favor of the plaintiff upon the questions of negligence and contributory negligence. And since the jury might have found for the plaintiff on these questions, the court, upon the defendant's demurrer to evidence, must so find. *Bass' Adm'r v. Norfolk Ry. Co.*, 100 Va. 1, 40 S. E. 100.

We are therefore of opinion that the circuit court did not err in overruling the demurrer to the evidence, and that its judgment must be affirmed. *Affirmed.*

NOTE.—In *Southern Railway v. Cooper*, 98 Va. 299, 302, it is said: "Under our practice, the only mode of taking away from the jury the determination of the weight to be given to evidence is by demurring to it."

The rule applicable to a demurrer to evidence is: "The demurrant admits the truth of his adversary's evidence and all just inferences which the jury could have properly drawn therefrom, and waives all of his own evidence in conflict therewith, and all inferences from his own evidence, although not in conflict therewith, which do not necessarily result therefrom." *Watts v. Southern Bell Telephone Co.*, 100 Va. 45, 47; *University of Virginia v. Snyder*, 100 Va. 567, 577; *Johnson v. C. & O. Ry. Co.*, 91 Va. 171 and authorities cited. G. C. G.

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HAWPE et al. v. BUMGARDNER et al.

*Supreme Court of Appeals of Virginia.*

Sept. 29, 1904.

[48 S. E. 554.]

CREDITORS' SUITS—CONSOLIDATION—JURISDICTION—STATUTE—APPEAL—SUBROGATION—PRAYER OF BILL—SUFFICIENCY—DOWER—HOMESTEAD.

1. Where defendant in two different creditors' suits petitioned the court that one in which he had filed demurrer be dismissed or consolidated with the other, and, in accordance therewith, a decree was entered consolidating the two causes, the fact that the decree contained a statement that defendant's demurrer was sustained cannot be taken advantage of by defendant on error to effect a reversal, on the ground that the sustaining of the demurrer put an end to that case; the order being merely an inapt expression, contrary to the plain intent of the court.

2. Where a creditors' bill alleges a state of facts entitling the plaintiff to be subrogated in equity under the prayer for general relief to the rights of a judgment creditor whose debt he had paid as defendant's surety, the failure to ask specifically for such relief is not ground for dismissing the bill on demurrer.
3. Where a suit by a surety to be subrogated to the rights of a judgment creditor whose demand against defendant he had paid is consolidated with a general creditors' suit against the same defendant, the fact that the amount of the judgment on which the surety's suit was based was less than \$20, and the bill did not allege that 60 days' notice of the purpose to bring suit was given defendant, as required by Code 1887, sec. 3572, is immaterial on appeal, because the general creditors' suit, being still pending, was sufficient to sustain all proceedings in the case subsequent to consolidation.
4. Where land set off to the widow as dower is not shown to have been used for other than agricultural purposes, or that the deceased owner had ever leased or used it as timber land, or derived revenue from the sale of timber thereon, the dowress, being but a life tenant, and subject to impeachment for waste, is not entitled to cut and sell merchantable timber growing on the land, but only to the use of the timber growing thereon so far as necessary for firewood, and to keep and maintain the buildings and fences in repair.
5. Lienors whose claims are paramount to the homestead rights of the heirs of a deceased debtor are entitled to sell the property for the satisfaction of their debts, subject to the dower rights of the widow, and without prejudice to the rights of the heirs as inheritors of the land incumbered by the liens; and hence the rights, if any, of the heirs of the deceased lienee to a homestead are in the fund arising from the sale, and can only be determined when the proceeds of sale are ready for distribution.
6. Errors first assigned in reply brief are not reviewable on appeal, under Code 1887, sec. 3464, providing that the petition for an appeal shall assign errors, and requiring that the petition shall state the case which the party applying for the appeal may wish to make.

Appeal from Circuit Court, Augusta county.

Creditors' suits by one Bumgardner and others against Adam H. Hawpe. On the death of Hawpe the action was reviewed in the name of his widow and heirs at law. From the decrees the widow and heirs at law appeal.

*Affirmed.*

*Curry & Glenn*, for appellants.

*J., J. L. & R. Bumgardner and J. A. Alexander*, for appellees.

HARRISON, J.

The suit of *Bumgardner v. Hawpe* was instituted in October, 1895, to enforce the lien of a judgment, and in November of that year a decree was entered on the bill taken for confessed, directing a general convention of the lien creditors of the defendant. Two years later the suit of *McKee* against the same defendant was instituted for a like purpose, and a similar decree was entered in that case, directing a convention of the lien creditors. Neither of these references had been executed in May, 1900, when the defendant, Adam H. Hawpe, appeared by counsel, and filed his demurrer and petition in the case of *McKee v. Hawpe*. In this petition he recites the pendency of the prior creditors' suit of *Bumgardner v. Hawpe*, complains of the injustice of being burdened with two suits, and prays that the *McKee* suit be dismissed or consolidated with the *Bumgardner* suit. In accordance with the prayer of this petition, a decree was entered consolidating the two causes, directing the commissioner to proceed to execute the references theretofore ordered in them, and requiring the plaintiff in the *McKee* case to pay the costs of that suit.

For convenience, it may be as well at this point to dispose of the contention of the appellants with respect to this decree.

They insist that the decree, on its face, sustains the demurrer, without providing for an amendment, and that this action was the end of the case of *McKee v. Hawpe*.

It is true there is a statement in the decree that the demurrer be sustained, but the decree further shows on its face that this was not intended, and not in fact what the court did. The language sustaining the demurrer was followed by the action of the court declining to dismiss the bill, and consolidating the causes, as requested by the defendant, Hawpe. It further appears from the record that the decree in question was practically a consent decree, intended to dispose of all technicalities, so that the causes should be heard and proceed thenceforth on the merits. The action taken by the court in declining to dismiss the bill and in consolidating the causes was in the interest, and at the request, of the defendant, Hawpe, and the inapt or unconsidered expression in question cannot be made the basis for a reversal of such action.

In November, 1900, the commissioner returned his report of the real estate of the defendant and the liens binding it. In December,

1900, a decree was entered in the consolidated causes, confirming this report, after overruling certain exceptions thereto, and appointing commissioners to sell the real estate mentioned therein.

In less than a month after this decree of sale, the defendant, Adam H. Hawpe, died, and at the following May term, 1901, of the court his death was suggested, and *scire facias* directed to issue against his personal representative, widow, and heirs at law. At the following term of the court, in November, 1901, the cause having been revived, a decree was entered appointing five commissioners to go upon the land, and assign to the widow of the defendant, Hawpe, one-third in quantity and value of the lands whereof her husband died seised and possessed as her dower. No exception was taken by the widow to the action of this commission, and in December, 1901, a decree was entered confirming their allotment of dower, and directing the commissioners of sale to proceed to sell the land subject to the widow's dower.

In May, 1902, the widow and minor heirs filed a demurrer and answer to the bill in the case of *Bumgardner v. Hawpe*. The ground of demurrer was that the bill showed on its face that the judgment sought to be enforced was for less than \$20, and did not allege that notice of the suit had been given the defendant 60 days before it was instituted, as required by statute, and that therefore the court was without jurisdiction to entertain the suit. The answer claims, on behalf of the widow, that she is entitled, not only to dower in kind, but asks that she be allowed to cut and use for her own benefit, as she may desire, a portion of the timber for which the land is alleged to be chiefly valuable. On behalf of the heirs, the answer claims that they are entitled to the homestead exemption in the lands of their father, and asks that it may be set apart for them, and that they may be allowed to use a portion of the timber, or that their entire homestead may be set apart in the timber on the lands.

This demurrer of the widow and heirs was overruled, and their answer stricken from the cause, without prejudice to the dower rights of the widow, as assigned, and without prejudice to the rights of the heirs as inheritors of the land incumbered by judgments against their father. The widow and heirs then filed a petition to rehear the decree overruling their demurrer and dismissing their answer, in which they set up practically the same matters set up by

their answer and demurrer. This petition was also dismissed. From the decree overruling the demurrer and dismissing the answer, and that subsequently entered, dismissing the petition to rehear, this appeal was taken.

The first ground of error assigned is the action of the court in overruling the demurrer filed by the appellants to the bill in the suit of *Bumgardner v. Hawpe*. The grounds urged in support of this assignment are: (1) That the plaintiff, who seeks to enforce a judgment paid by him as surety, does not ask to be subrogated to the rights of the judgment creditor; and (2) that the judgment sought to be enforced was for a sum less than \$20, and the bill does not allege that 60 days' notice of the purpose to bring suit was given the defendant, as required by sec. 3572 of the Code of 1887; it being contended that the failure to allege that this notice had been given left the court without jurisdiction to entertain the bill.

As to the first contention, it is sufficient to say that the bill alleges a state of facts that entitles the plaintiff to be subrogated in equity, under the prayer for general relief, to the rights of the judgment creditor; and where this is the case, the failure to ask specifically for such relief is not ground for dismissing the bill upon demurrer.

As to the second contention, it is not necessary to decide in this case whether the failure to allege that notice of the suit had been given left the court without jurisdiction in the suit of *Bumgardner v. Hawpe*, for the reason that, if the contention of appellants was sustained, the result would be the same, as the suit of *McKee v. Hawpe*, a general creditors' suit, was pending, which was ample to sustain all subsequent proceedings in the case.

The second assignment of error is that the court refused to grant the prayer of the widow's petition that as dowress she be allowed an interest in the timber on the land, and be permitted to cut and use the same as she might desire.

The real estate left by Adam Hawpe consisted of a tract of land containing 723 acres and 26 poles. The commissioners assigned to the widow 220 acres, 3 roods, and 30 poles, including the improvements, which they say was a fair and equitable quantity to assign from the whole as dower. This report was not excepted to by the widow, was confirmed, a plat and survey showing her rights duly recorded, and the widow placed in possession. The contention is

that the land is chiefly valuable for its timber, and that the widow should be allowed, in addition to the dower assigned and accepted by her, the right to cut and market a part of the timber. There is no evidence that the land has ever been used for other than agricultural purposes, or that the owner had ever leased or used it as timber land, or derived revenue from the sale of timber thereon.

Under these circumstances, the widow is entitled to the use of the timber growing upon her dower land so far as necessary for her firewood, and to keep and maintain the buildings and fences on the land in repair; but being a tenant for life, and subject to impeachment for waste, she is not entitled to cut and sell merchantable timber growing upon such lands. That would put it in her power to damage those entitled to the inheritance, and even destroy their reversionary rights, which she is not permitted to do.

The third assignment of error is to the action of the court in dismissing the answer of the infant heirs and their petition for a rehearing, without allowing the claim set up by them to a homestead exemption in the land.

The report of the commissioner shows the aggregate of judgment liens to be, as of November 21, 1900, \$839.90. It appears affirmatively that of this sum \$611.55 is paramount to the homestead. The record is silent as to whether or not the homestead is waived as to the remaining \$228.35. This being the case, and conceding the residue of the liens to be inferior to the homestead, the proper action, after assigning dower, was that taken by the court, to sell the land, subject to the dower rights of the widow, and without prejudice to the rights of the heirs as inheritors of the land incumbered by judgments against their father. The lienors whose claims were paramount to the homestead were entitled to a sale of the property for the satisfaction of their debts. The right of the heirs to a homestead, if entitled thereto, was in the fund arising from the sale remaining after the liens paramount to the homestead had been satisfied. Their right to a homestead can therefore only be determined when the case is ready for a distribution of the proceeds of sale.

The fourth and last assignment of error made in the petition is to the action of the court in holding that the McKee judgment was a valid and subsisting lien. The commissioner reported this judgment as a valid lien, and Adam Hawpe in his lifetime excepted to

the finding of the commissioner upon other grounds, but it nowhere appears that he ever claimed that it had been paid. His exception to the report auditing the lien was overruled, and the report was confirmed. The suggestion of appellants that the McKee judgment is not a valid and subsisting lien is not sustained by the record, and there was no error in the action of the lower court with respect thereto.

The appellants in their brief, in reply to the appellees' brief, assign other errors, which have in the main been considered in what has been already said.

In the case of *Orr v. Pennington*, 93 Va. 268, 24 S. E. 928, this court has held that the petition for appeal required by sec. 3464 of the Code of 1887, is in the nature of a pleading, and should state the case which the party applying for the appeal wishes to make in the appellate court; that it must assign all the errors relied on for a reversal of the case, so that the opposite party may know what questions are to be raised in the appellate court, and not have new questions sprung at, or just before, the hearing of the cause, when there may not be sufficient time or opportunity for meeting them. The errors assigned in the reply brief are not material; under the rule mentioned, however, they cannot be considered.

We find no error in the decrees appealed from to the prejudice of appellants, and they must be affirmed. *Affirmed.*

NOTE.—By contrasting the above case with that of *Macaulay v. Dismal Swamp Land Co.*, 2 Rob. 507, the distinction made by our courts as to when a widow may or may not cut and sell timber growing upon her dower land is very clearly brought out.

In the above case there was no evidence to show that the land had ever been used for other than agricultural purposes, or that the owner had ever leased or used it as timber land, or derived revenue from the sale of timber thereon. The court said: "Under these circumstances, the widow is entitled to the use of the timber growing upon her dower land so far as necessary for her firewood, and to keep and maintain the buildings and fences on the land in repair; but being a tenant for life, and subject to impeachment for waste, she is not entitled to cut and sell merchantable timber growing upon such lands."

In the case of *Macaulay v. Dismal Swamp Land Co.*, a husband died seized of land which was incapable of cultivation, and which was valuable only for its timber. It appeared that previous to the husband's death, the timber had been worked, and large profits derived from the sale of shingles. The court held that the widow was entitled to one-third of the profits received from the sale of shingles after her husband's death.

On the similar subject of the *right to open mines*, the law is laid down in

*Bond v. Godsey*, 99 Va. 566, as follows: "It is settled law that a life tenant has no interest in, and no right to open and work unopened mines. He may open new pits or shafts for working an old vein of coal; he may sink new shafts into the same veins; he may penetrate through a seam, or open and dig into a new seam which underlies the first, and take coal to any extent from the mine already opened, but he may not open mines. He is guilty of waste if he does, and equity will enjoin him from its commission. These propositions are so well established as to scarcely need citation of authority in their support. See *Williamson v. Jones*, 43 W. Va. 562, where the cases upon the subject are exhaustively considered and discussed. *Clavering v. Clavering*, 2 Peere Williams, 388; 1 Washburn on Real Property (4th ed.), 144; *Findlay v. Smith*, 6 Munf. 134; *Crouch v. Puryear*, 1 Rand. 258; *Macaulay v. Dismal Swamp*, 2 Rob 507; *Carr v. Carr*, 4 Dev. & B. (N. C.), 179; *Conner v. Shephard*, 15 Mass. 154; *West Moreland Co.'s Appeal*, 85 Pa. 344; *Marshall v. Mellon*, 179 Pa. 371."

G. C. G.

MOORE LIME CO. V. JOHNSTON'S ADM'R.

*Supreme Court of Appeals of Virginia.*

Sept. 29, 1904.

[48 S. E. 557.]

MASTER—DEATH OF SERVANT—NEGLIGENCE—EVIDENCE—SUFFICIENCY—ALLEGATION AND PROOF—VARIANCE—APPEAL.

1. An objection because of variance cannot be raised for the first time in the Supreme Court.
2. In an action against an employer for damages for the death of an engineer, resulting from the explosion of the throttle valve of a steam engine which deceased was running, evidence examined, and *held* insufficient to show that the failure to provide a "drip cock" or "by-pass" for the valve constituted negligence on the part of defendant.
3. Negligence having been based on the employment by defendant of an alleged incompetent master mechanic, mere proof that the master mechanic removed from the throttle-valve a "drip cock" which had been attached to it after many years of safe and effective use of the valve without the "drip cock," is insufficient to sustain the charge of negligence.
4. Evidence *held* insufficient to show that the employment of plaintiff's intestate as an engineer was negligent because of his youth and inexperience.
5. The mere occurrence of an accident causing injury to an employe does not raise even a *prima facie* presumption that the master has been guilty of negligence or a breach of duty.

Error to Circuit Court, Botetourt county.